Daniel J. Connolly
+1 612 766 7806
daniel.connolly@FaegreBD.com

Faegre Baker Daniels LLP
2200 Wells Fargo Center ▾ 90 South Seventh Street
Minneapolis ▾ Minnesota 55402-3901
Phone +1 612 766 7000
Fax +1 612 766 1600

September 26, 2018

The Honorable Susan Richard Nelson
U.S. District Judge, District of Minnesota
United States District Court
774 Federal Building
316 N. Robert Street
St. Paul, MN 55101

In Re: ***National Hockey League Players' Concussion Injury Litigation***
Court File No. 14-2551 (SRN/JSM)

Dear Judge Nelson:

I am writing to set forth the NHL's position with respect to a protocol for the conduct of trials before this Court. At the Court's request, the NHL met and conferred with plaintiffs in an attempt to reach agreement on a protocol for trying "local cases" – that is, cases filed directly in this Court over which the Court has personal jurisdiction. The parties generally agreed that the process should involve a larger trial pool that is then whittled down to four cases that would be tried. The parties also agreed that the Court should resolve any personal jurisdiction disputes in the trial pool cases and that each side should exercise one strike at the end of the process of selecting cases for trial.

The NHL's disagreements with plaintiffs primarily concern several provisions that the NHL believes will ensure a more robust and informed trial-selection process; the manner in which the order of trials will be determined; and provisions adopted in other MDL proceedings that the NHL believes are needed to prevent the use of voluntary dismissals to thwart an even-handed case selection process.

Below is a summary of the NHL's proposal followed by a brief explanation of the NHL's positions with respect to the areas on which the parties could not agree. The NHL also briefly reiterates, at the end of this letter, its strong view that it is critical to move the rest of this MDL proceeding forward during any trial selection and preparation process to ensure that the underlying goals of the MDL procedure are achieved.

I. Discussion Of Trial Selection Protocol

A. The NHL's Proposal

The NHL's proposal (which is attached to this letter as Exhibit A) can be summarized as follows:

- Each side would nominate eight cases for the initial trial pool by October 19, 2018. If plaintiffs are unwilling or unable to try any of the cases proposed by the NHL, they must inform the NHL immediately so that the case can be dismissed without prejudice and a replacement can be chosen by the NHL.

- Expedited medical records collection would take place in those 16 cases.

- The parties would meet and confer on any disputes with respect to personal jurisdiction or venue in the 16 cases and engage in motion practice if they cannot resolve any such disputes on their own.

- Prior to any motion practice, a party could choose to replace any case that the other side is challenging based on lack of personal jurisdiction or venue with another trial candidate. If the Court's ruling on jurisdictional or venue issues results in dismissal of the plaintiff in a trial pool case, the party that selected that case for the trial pool may identify a new plaintiff's case for the trial pool within ten days after the dismissal order is issued. To avoid delay, discovery would proceed immediately regarding the replacement plaintiff's case, even while any jurisdictional or venue issues are resolved. If a replacement case is dismissed for lack of jurisdiction or improper venue, it would not be replaced with a third case.

- Following resolution of any jurisdictional or venue motions, the parties would conduct case-specific discovery over the course of 150 days in each of the trial pool cases, including, but not limited to, a plaintiff deposition, independent medical exams, production of any additional medical records, workers' compensation records, documents related to any other legal proceeding to which the plaintiff has been a party, third-party depositions of club personnel and third-party document production.

- If, at any point, plaintiffs voluntarily dismiss a case selected by the NHL for inclusion in the trial pool, the NHL would be able to replace the dismissed plaintiff. If plaintiffs voluntarily dismiss a case after discovery is complete, the

dismissal must be with prejudice and, if the dismissal is of one of the NHL's selected cases, the NHL would be permitted to strike one of plaintiffs' selections at that point.

- After limited discovery is complete, each side would select three finalist candidates for trial from the larger pool of 16 cases.

- Each side would then be able to strike one of the other side's final three cases.

- The Court would draw names from a hat to determine the order of trial of the remaining four cases. Once the order of trials is established, if plaintiffs dismiss a case selected by the NHL, the NHL would be able to choose which case is tried in its place. If plaintiffs dismiss both cases selected by the NHL, no trials would take place until the NHL has the opportunity to select two additional cases and prepare them for trial. The NHL would be permitted to select the case stricken by plaintiffs, which will have gone through the full discovery process and could be readied for trial without significant delay. The NHL would also be permitted to move for the fees and costs incurred in working up any case that is voluntarily dismissed at this stage.

- The Court would then enter a scheduling order for each of the cases selected for trial that includes deadlines for completing fact and expert discovery as well as any motions for summary judgment (e.g., preemption, statute of limitations), *Daubert* motions and motions in limine.

B. Discussion Of Areas Of Disagreement

The parties have agreed on several of the provisions outlined above but continue to disagree on several specific issues, each of which is addressed below.

1. Number Of Cases In Initial Trial Pool

Plaintiffs propose that each side nominate ***six*** cases for the initial trial pool. (Pls.' Proposal ¶ 2.) The NHL proposes that each side nominate ***eight*** cases to ensure a more robust selection process. (NHL Proposal ¶ 2.) The NHL's proposal is more in line with other MDL proceedings that begin with larger case pools to ensure a broader pool from

which the final cases are selected.[1] *See, e.g.*, Order No. 25 ¶ 7, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 1:14-md-02543-JMF (S.D.N.Y. Nov. 19, 2014) (providing that an initial pool of 18 cases would be identified for case-specific fact discovery and potential trial);[2] Case Mgmt. Order No. 14 ¶¶ I.B.1, 1.B.2, *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 1:14-cv-01748 (N.D. Ill. Nov. 6, 2014) (allowing selection of eight cases per side for each type of injury alleged in the proceeding); Pretrial Order No. 19 ¶ 3, *In re Cook Med., Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:13-md-02440 (S.D. W. Va. Dec. 19, 2013) (providing for selection of pool of 30 cases); Am. Case Mgmt. Order No. 24, *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2010 WL 4024778, at *3 (S.D. Ill. Oct. 13, 2010) (selecting 24 cases for trial pool after plaintiffs had objected to initial proposal of 50). A larger pool will ensure a more informative and successful process.

2. Process For Replenishing Trial Pool After Personal Jurisdiction Challenges

Plaintiffs propose that the parties be allowed to nominate additional cases if fewer than four of one side's cases remain ***after*** any jurisdictional challenges are resolved by the Court. (Pls.' Proposal ¶ 7.) Plaintiffs also propose that discovery be deferred in any such replacement cases until jurisdictional and venue issues are resolved. (*Id.*) By contrast, the NHL proposes that any plaintiff dismissed by the Court can be replaced within ten days and that discovery begin immediately. (NHL Proposal ¶ 7.)

Plaintiffs' approach could result in too small a trial pool because it would only allow replacements if fewer than four of a party's selected cases remain. It would also foster unnecessary delay and uncertainty. The party designating a replacement case should have already vetted it for any jurisdictional or venue issues, which will be much clearer at that point in the process, since the Court will have already issued initial rulings on these matters. Accordingly, the NHL's proposal provides that discovery will commence immediately in any replacement case, while still allowing the parties a ten-day period to meet and confer regarding any additional jurisdictional or venue issues. (NHL Proposal ¶ 7.)

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[1] While the NHL does not believe that a bellwether trial process makes sense in this MDL proceeding, it has looked to bellwether trial precedents from other MDL proceedings as a guide for a trial protocol.

[2] Each of the orders cited in this letter is available via PACER. For the Court's convenience, the NHL has downloaded all the orders and can submit them at the Court's request.

Plaintiffs also propose that the parties confer with the Court regarding whether a further "replacement" case may be nominated if a replacement case put forward by either side is dismissed by the Court for jurisdictional or venue reasons, leaving that side with fewer than four trial candidate cases. (Pls.' Proposal ¶ 7.) The problem with this approach is that it would create an endless merry-go-round and make it impossible to establish a fixed trial pool and move forward with the process. The NHL's proposal thus provides that if a replacement case is dismissed for jurisdictional or venue reasons, no new case shall be nominated in place of the dismissed case. (NHL Proposal ¶ 7.) The NHL's approach makes more sense because it ensures that the process will move more quickly and more fairly.

3. Nature Of Discovery In Trial Pool Cases

Plaintiffs propose that the trial pool be narrowed prior to any case-specific discovery, and that such discovery take place in only ***eight*** cases; plaintiffs also do not specify what case-specific discovery is presumptively allowed. (Pls.' Proposal ¶ 6.) By contrast, the NHL proposes that such discovery be conducted for ***all*** of the trial pool cases, including (but not limited to) a deposition of each plaintiff, independent medical examinations of the plaintiff (including neurological, psychiatric and neuropsychological testing akin to the examinations that were undertaken of the class action named plaintiffs), production of any medical records not previously shared between counsel, production of any workers' compensation records, documents (including transcripts of depositions or other testimony as well as documents related to any qualified medical examinations) related to any other legal proceeding to which the plaintiff has been a party, third-party depositions of club personnel and third-party document production. (NHL Proposal ¶ 6.)

The NHL's approach will result in a more robust and informed trial selection process because the parties will obtain information about a larger number of cases before having to choose which cases proceed toward trial. It would also be more fair. The NHL has virtually no information about the plaintiffs at this point and should be allowed to conduct discovery in a larger group of cases before it has to winnow the trial candidates. Otherwise, it would simply be taking a shot in the dark, unlike plaintiffs' counsel, who have access to their clients and would be able to make much more educated choices than the NHL if their proposal is adopted.

The NHL's proposal will also better facilitate an efficient discovery process by defining the scope of discovery upfront, thereby reducing the likelihood of disputes over particular discovery requests going forward. Plaintiffs' approach, by contrast, is ill-

defined and would unnecessarily defer the task of defining the scope of discovery until such discovery is underway, significantly increasing the risk of delay.[3]

Notably, the NHL's discovery proposal is in line with what other MDL courts have authorized both in terms of number of cases and type of discovery. *See, e.g.*, Case Mgmt. Order No. 11 ¶¶ III.D, IV, *In re Bard IVC Filters Prods. Liab. Litig.*, No. 2:15-md-02641-DGC (D. Ariz. May 5, 2016) (providing for "records discovery" for 48 plaintiffs and full discovery for 12 plaintiffs before selection of final trial group after a complete plaintiff fact sheet was submitted); Case Mgmt. Order No. 2 ¶ 5(d), *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, No. 2:14-md-02592-EEF-MBN (E.D. La. Sept. 18, 2015) (providing for discovery, including four depositions, for each of 40 plaintiffs in initial pool in proceeding in which a fact sheet order was entered four months prior, *see* Pretrial Order No. 13, *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, No. 2:14-md-02592-EEF-MBN (E.D. La. May 4, 2015)); Order No. 25 ¶ 42, *GM Ignition Switch* (providing for case-specific discovery of the 18 cases in the initial discovery pool, and specifying that this "case-specific fact discovery may consist of (a) additional document requests beyond those in the Short-Form PFS; (b) a deposition of Plaintiff; (c) depositions of treating physicians or medical providers; and (d) depositions of witnesses to the incident that is the subject of the claim" one month after a complete plaintiff fact sheet was submitted); Case Mgmt. Order No. 14 ¶ II.A, *In re Testosterone* (allowing discovery in the 16 trial pool cases, including up to four depositions per case, and expressly noting that the additional discovery was necessary "to enable the parties to assess the . . . cases," in order entered one month after an order was entered requiring plaintiff fact sheets, *see* Case Mgmt. Order No. 9, *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 1:14-cv-01748 (N.D. Ill. Oct. 6, 2014)); *see also* Pretrial Order No. 19 ¶ 10, *In re Cook* (providing for "case specific discovery" on all "[d]iscovery [p]ool cases").

Accordingly, the NHL submits that the Court should adopt its proposal that all cases in the trial pool proceed to case-specific discovery, as delineated in the NHL's proposal.

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[3] The NHL is also unsure whether plaintiffs' approach would include independent medical exams since their proposal only references Rule 26 and not Rule 35. As the Court knows, such exams were critical to obtain a full picture of the proposed master complaint class representatives, and would be essential in selecting final trial candidates and exercising the strike option that is included in both parties' proposals.

4. Replenishing Case Pool Following Voluntary Dismissals

The NHL proposes that if any case chosen by the NHL as a trial pool candidate is voluntarily dismissed by the plaintiff ***at any time***, the NHL be allowed to replace it with another case of its choosing within 10 days, or, if the dismissal occurs after the case-specific discovery process is complete, that the dismissal would be with prejudice and the NHL would be permitted to strike one of plaintiffs' proposed cases. (NHL Proposal ¶ 8.)

Plaintiffs agree to the proposal to allow for the replacement of dismissed cases, but they have added a provision that would allow plaintiffs to voluntarily dismiss their cases even after they are scheduled for trial with no clear consequence; they merely propose that "the parties shall address with the Court the implications of the dismissal" to their proposal. (Pls.' Proposal ¶ 8.) This provision is extremely troubling because it would provide no protection against manipulation of the trial scheduling process by strategic voluntary case dismissals. As such, the NHL has added a provision that would: require that the voluntary dismissal of any cases scheduled for trial be with prejudice; entitle the NHL to move for reasonable fees in any such cases; and provide that, if plaintiffs dismiss both of the trial cases selected by the NHL, then no trial will take place until the NHL is permitted to select and prepare for trial two additional replacement cases that would take the same place in the order of trials previously occupied by the dismissed cases. (NHL Proposal ¶ 11.) In addition, the NHL would be able to choose a case stricken by the plaintiffs at this point. Since any such stricken cases would have already been subject to discovery, that option should avoid delay.

Once again, these provisions concern a matter of basic fairness because it is critical to ensure that plaintiffs do not manipulate the trial selection process. The provision for allowing the NHL to replace candidates who voluntarily dismiss their claims (or, after discovery, to strike plaintiff selections for any defense selection that is dismissed) is important to ensure that the pool of claims from which trial candidates are selected is fairly balanced. There is a long pattern in MDL proceedings of plaintiffs dismissing cases they do not want to try in order to skew the trial pool toward their preferred cases. As a result, many MDL courts have recognized the need to allow defendants to select replacements for potential trial cases selected by defendants that are subsequently dismissed by the plaintiffs or to adopt other measures to deter plaintiffs from gaming the trial selection process. *See, e.g.*, Second Am. Pretrial Order No. 13 on Bellwether Discovery & Trials ¶ III.A.3, *In re Fluoroquinolone Prods. Liab. Litig.*, No. 15-2642 (JRT) (D. Minn. June 5, 2017) ("In the event a case in the Avelox Only Discovery Cases selected by the Bayer Defendants is voluntarily dismissed, or removed from the Avelox Only Discovery Cases pursuant to sub-paragraph (1), *supra*, the Bayer Defendants may select a replacement case of their choosing from the Avelox Only cases."); Case Mgmt. Order No. 11 ¶ V.B.1, *In re Bard IVC Filters* ("Should Plaintiffs

withdraw, settle, or dismiss without prejudice a case from Discovery Group 1, such case will be replaced" and "[t]he party that originally designated the eliminated case shall select the replacement."); Case Mgmt. Order No. 9 (Early Trial Selection Process) ¶¶ 4, 6, *In re Fosamax Prods. Liab. Litig.*, No. 1:06-md-01789-JFK-JCF (S.D.N.Y Jan. 31, 2007) ("Each case that is withdrawn from the list of twenty-five cases or dismissed by plaintiffs shall be replaced by a case selected by Merck's counsel[.]"; "[I]f any particular plaintiff dismissed his case without settlement, then Merck shall have the right to select the replacement case from the remaining twenty-five cases in the trial selection batch."). This Court should do the same.

The provisions specific to dismissals after the trial order is issued are also essential to prevent a one-sided and abusive trial selection process in which plaintiffs are able to manipulate the process such that only their preferred cases are tried and needless investments are made in cases that plaintiffs never intend to try. Indeed, other MDL courts have adopted similar mechanisms to deter manipulative trial selection tactics. *See, e.g.*, *In re FEMA Trailer Formaldahyde Prods. Liab. Litig.*, 628 F.3d 157, 163-64 (5th Cir. 2010) (affirming trial court's dismissal of proposed bellwether plaintiff with prejudice where counsel sought to replace the candidate with a different plaintiff because a contrary decision would "set a precedent that other plaintiffs could use to manipulate the integrity of the court's bellwether process" and "subject[] [the defendant] to the rigors and costs of trial preparation . . . without reaching a resolution of [the] claim"); *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1505, 1525 (D. Colo. 1989) (allowing dismissal of bellwether candidates without prejudice but doing so "on condition of payment of fees and costs incurred" by the defendants in preparing for trial). In order for the proposed trial selection process to provide the NHL with any meaningful input, some mechanism must be in place to deter strategic dismissals and afford the NHL meaningful remedies when such mechanisms nevertheless fail. Accordingly, the Court should adopt the NHL's provisions for replacement picks and entertain motions for fees and costs in appropriate circumstances.

5. Ordering Selected Cases For Trial

Plaintiffs propose that after each side has exercised its strike of one of the final six trial candidates, the parties would submit briefing regarding trial order, and the Court would choose the order in which the remaining four cases would be tried. (Pls.' Proposal ¶ 11.) The NHL proposes that after each side has exercised its strike of one of the final six trial candidates, the Court would draw the names of the remaining four cases from a hat to determine the order of trial in those cases. (NHL Proposal ¶ 11.)

The NHL's approach makes more sense because the Court should not be placed in the position of deciding the order of trials and because random selection ensures that

neither side will feel that the process was unfair. For these reasons, a number of MDL courts have recognized the benefits of random selection in the bellwether selection process. *See, e.g.*, Order at 2 & n.2, *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, No. 3:16-md-02734-MCR-GRJ (N.D. Fla. Mar. 13, 2018) (explaining that "the [c]ourt . . . randomly selected the order of the cases" by "utilizing the 'RAND' function in Microsoft Excel to generate random numbers for each case and sorting the numbers from least to greatest, with the lowest number representing the first case to be tried"); Case Mgmt. Order No. 5 ¶ 1.e, *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, No. 2:14-md-02592-EEF-MBN (E.D. La. Aug. 1, 2016) (providing that the court would "randomly" select the first case for trial); Case Mgmt. Order No. 9 (Early Trial Selection Process) ¶ 6, *In re Fosamax* ("The [c]ourt will randomly select the order in which each of the three cases will be tried."). Plaintiffs offer no reason for their proposal to depart from this mainstream approach, suggesting that they believe that they can secure some kind of advantage by having the Court select the order of the cases. This gambit should be rejected. The random selection approach is the one that is more fair to the parties and should be adopted here.

II. Moving The MDL Proceeding Forward

As the Court knows from previous conferences, the NHL has strong concerns that a bellwether trial process would not be informative in this litigation and therefore has indicated that it will not execute *Lexecon* waivers or otherwise consent to a bellwether process for conducting trials in this MDL proceeding.

The NHL is also very concerned that focusing solely on a few trials would further delay resolution of the vast majority of cases in this proceeding and undermine (rather than advance) the fundamental purpose of this MDL proceeding, which is to coordinate ***pretrial discovery and motion practice across the entire pool of cases***.

The claims of each of the 140 individual plaintiffs in this MDL proceeding have essentially been on ice for several years while the parties focused on class certification. (*See* Pretrial Order No. 18 ¶ 1, ECF No. 296 ("The parties understand that full merits discovery will not be completed prior to class certification briefing.").) This is troubling because "[a]n MDL proceeding should not be viewed as a place to 'warehouse' cases indefinitely." MDL Standards and Best Practices at 3, Duke Law Center for Judicial Studies (2014). It is also troubling because the longer cases sit without discovery, the harder it will be to obtain all the relevant facts, since witnesses may not be available, documents may be lost and witnesses may forget relevant facts with each passing year. Now that the Court has determined that plaintiffs' claims are not amenable to class treatment and with common discovery from the NHL complete (or virtually so), the only authorized step left for this Court as an MDL tribunal charged solely with conducting

"coordinated . . . ***pretrial*** proceedings," 28 U.S.C. § 1407(a) (emphasis added), is to oversee discovery and pretrial motion practice (including jurisdictional and summary judgment motions) regarding the individual claims.

Alternatively, if the Court remains firm in its position that it will not allow discovery to proceed in the remainder of the MDL cases, then the time has come to bring this MDL proceeding to a close. After all, absent the continuation of "coordinated or consolidated ***pretrial*** proceedings," there is no purpose left for this MDL proceeding. 28 U.S.C. § 1407(a) (emphasis added); *see also In re NHL Players' Concussion Injury Litig.*, 49 F. Supp. 3d 1350, 1351 (J.P.M.L. 2014) (transferring cases to District of Minnesota "for coordinated or consolidated ***pretrial*** proceedings") (emphasis added). Accordingly, unless the Court authorizes broad discovery and other pretrial activities that would advance the transferred cases toward ultimate trial in their transferor jurisdictions or jurisdictions of proper venue, it is effectively conceding that the pretrial proceedings the Court intends to conduct as to the non-local cases is complete – and there is no justification for continuing to hold those cases in the MDL proceeding with no activity.

We are available to discuss these matters further at the Court's convenience.

Very truly yours,

s/Daniel J. Connolly

Daniel J. Connolly

DJC/djb